

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
BRENDA FAUSAK against)	Case No. U-18199
CONSUMERS ENERGY COMPANY.)	
_____)	

At the November 21, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

History of Proceedings

On November 9, 2016, Brenda Fausak (Complainant) filed a complaint against Consumers Energy Company (Consumers) alleging that Consumers improperly accused her of meter tampering, improperly billed her for electricity use during the time the meter tampering occurred, and improperly shut off service to her residence. Ms. Fausak requested that the Commission order Consumers to restore her electric service, and bill her for only one year of use as a billing error, instead of for the nearly five and one-half years of unauthorized use that it has currently billed. On January 17, 2017, Consumers filed an answer to the complaint, denying the Complainant's allegations.

On January 24, 2017, a prehearing conference was held before Administrative Law Judge Martin D. Snider (ALJ). The Complainant, Consumers, and the Commission Staff (Staff)

participated in the conference. On March 29, 2017, an evidentiary hearing was held. The Complainant, Consumers, and the Staff participated in the hearing. The record consists of 85 pages of transcript and 16 exhibits.

Background

Ms. Fausak, a 59-year-old woman with disabilities, has resided in the home at issue in this proceeding since 2006. Ms. Fausak's residence is a two-unit rental divided into apartment A and apartment B. The Complainant is a tenant of apartment A, but is responsible for all of the building's electricity use. Consumers bills Ms. Fausak for all electric service provided to both apartments and the common areas through a single meter. She frequently had other people living or staying with her throughout the duration of her residency. Although she and her husband are separated, he often visits. Complaint; 2 Tr 21-27, 36-41.

On March 21, 2016, following the receipt of an anonymous tip, Consumers went to Ms. Fausak's residence and discovered a damaged analog meter in her meter socket. Nearly five and one-half years before, on October 11, 2010, the analog meter was reported stolen from a nearby unoccupied house. 2 Tr 53-55; 68-69, Consumers' Exhibit C-1. A digital meter had been installed on the Fausak residence prior to October 2010 and should have remained there for the entire time frame at issue. Coinciding with the date of the report of the analog meter theft, Ms. Fausak's electricity use dropped dramatically. Consumers theorized that Ms. Fausak switched her assigned digital meter with the analog meter each month from the time that the analog meter was reported stolen In October 2010 until the stolen meter was found installed on her home in March 2017, thereby causing a large portion of the building's electric use to be unregistered, unauthorized, and unbilled. *Id.*; Consumers' Exhibit C-3. Consumers disconnected the

Complainant's electric service, and billed her for \$15,327.10. This bill includes \$13,778.96 for unauthorized use of electric service for the time period of October 27, 2010 through March 2, 2016, a \$130¹ connect fee, a \$1,000 security deposit, and \$418.14 in investigative costs. PFD, p. 29; Consumers' response to Ms. Fausak's complaint, p. 4.

Ms. Fausak testified that she has no knowledge of how the stolen meter came to be installed on her home and theorized that her sister was connected with the stolen meter and its installation on her residence. She asserted that her electric bill was lower due to having fewer people living in her home, rather than energy theft. 2 Tr 17-25.

Proposal for Decision

On May 9, 2017, the ALJ issued his proposal for decision (PFD). He concluded that Consumers properly determined Ms. Fausak was responsible for the unauthorized use of Consumers' electric service, and that she is responsible for the reasonable cost of the electricity during the period of unauthorized use. The ALJ also found that Consumers properly and reasonably calculated Ms. Fausak's bill in a manner consistent with the Commission's rules and Consumers' Electric Rate Book. Finally, he determined that Consumers properly billed the Complainant \$15,327.10, which includes \$13,778.96 for unauthorized use of electric service, a \$1,300.00 [*sic; see* footnote 1, below] connect fee, a \$1,000 security deposit, and \$418.14 in investigative costs. He recommended that the Commission adopt his findings. PFD, p. 29; Consumers' response to complaint, p. 4, paragraph 14. A full accounting of the facts and evidence is contained in the PFD and will not be repeated in this order except as needed for clarity. Any

¹ The PFD states that the connect fee is \$1,300.00. This amount is a typographical error. The correct connect fee is \$130.00. *See*, Consumers' response to Ms. Fausak's complaint, p. 4, paragraph 14.

arguments not specifically addressed in this order are deemed irrelevant to the findings of fact and conclusions of law in this matter.

Exceptions and Replies

The ALJ provided the parties the opportunity to file exceptions to the PFD by May 30, 2017, and replies to exceptions, if necessary, by June 13, 2017. The Complainant filed her exceptions on May 30, 2017. Consumers filed its reply on June 13, 2017.

Mich Admin Code, R 792.10435(3) and (4) provide that:

(3) Exceptions and replies to exceptions shall be supported by reasoned discussion of the evidence and law. Exceptions and replies to exceptions containing factual allegations claimed to be established by the evidence shall include a reference to the specific portions of the record where the evidence may be found. Materials incorporated by reference shall be attached.

(4) Exceptions shall clearly and concisely recite the specific findings of fact and conclusions of law to which exception is taken or the omission of, or imprecision in, specific findings of fact and conclusions of law to which the party accepts.

In her exceptions, Ms. Fausak first opines that the ALJ is in error when he states that ““Ms. Fausak does not dispute Consumers’ belief that the stolen meter was attached and disconnected every month for a five and one-half year period[.]”” Ms. Fausak’s exceptions, p. 4, quoting the PFD, p. 3. Next, she admits that “Ms. Fausak does not dispute that this is Consumers theory, she does dispute that this happened.” Ms. Fausak’s exceptions, p. 4.

Consumers’ reply does not address this particular exception.

The Commission is not persuaded that the ALJ erred. Ms. Fausak’s exceptions state that she agrees as to what Consumers’ theory is, but does not agree that the theory is true. Ms. Fausak’s exceptions, p. 4. Examination of the PFD reveals that the ALJ included an accurate accounting of

these statements. Accordingly, this exception cannot be sustained because there appears to be no exception asserted.

Ms. Fausak takes exception to the placement of the burden of proof in this case. She asserts that the ALJ “improperly placed the burden on Ms. Fausak to prove that she did not commit fraud.” She contends that there is a three-step system regarding customer billing disputes, the first two of which are informal and require the burden of proof to be placed on the utility. *Id.*, p. 5. Ms. Fausak believes that the rules for a formal contested hearing “do not specifically place the burden of proof on the utility,” but “due process can only be served by continuing to place the burden on the utility at this third stage.” *Id.*, pp. 5-6. She goes on to explain that her argument is that “Consumers Energy must provide evidence that Ms. Fausak tampered with her meter or that she failed to ‘exercise reasonable diligence’ to protect against meter tampering.” *Id.*, p. 6.

Consumers responds that the rules for the burden of proof at formal hearings is clearly set forth in Mich Admin Code, R 792.10446 which states that:

The complainant generally has the burden of proof as to matters constituting the basis for the complaint and the respondent has the burden of proof as to matters constituting affirmative defenses. The burden of proof, however, may be differently placed, or may shift, as provided by law or as may be appropriate under the circumstances.

Consumers’ reply to exceptions, p. 2.

The Commission agrees with the ALJ and Consumers on this issue. Both correctly point out that the “[t]he Commission’s rules for consumer utility complaints establish a very clear distinction between formal and informal complaints.” Consumers’ reply to exceptions, pp. 5-6, quoting the PFD, p. 19. There are rules for informal hearings regarding a consumer utility complaint, as set forth in R 460.154, as well as rules for informal appeals, as set forth in R 460.158 *et seq.* These procedures completely address the informal hearing and informal appeal process.

In residential complaint cases, the Commission allows some leeway in the formality and technical requirements of the hearing process to ensure complainants are provided with a fair opportunity to present their side of the case; however, the rules for a formal hearing involving a formal consumer utility complaint, as set forth in Mich Admin Code, R 792.10439 *et seq.*, are not contingent upon, or a part of the informal hearing and informal appeal process. Thus, there is no three-step system as asserted by the Complainant. The utility has the burden of proof in an informal proceeding, but this burden is not carried over to the formal hearing process. In a formal proceeding, the complainant has the burden of proof regarding matters that constitute the complaint. Accordingly, this exception cannot be sustained because the rules governing the burden of proof required for a formal hearing were correctly employed by the ALJ.

Next, Ms. Fausak asserts that the ALJ incorrectly found that she did not provide evidence of reasonable diligence to prevent meter tampering.² The exception does not contain a reference to the “specific portions of the record where the evidence may be found,” as required by R 792.10435(3). However, she suggests that the best evidence of her reasonable diligence is the fact that 14 meter readers viewed her meter between October 2010 and March 2016, and none reported anything suspicious. Ms. Fausak’s exceptions, pp. 6-7.

Consumers did not address this exception.

The Commission is not persuaded that the ALJ is in error regarding evidence of Ms. Fausak’s due diligence. Ms. Fausak incorrectly attests that “Consumers must show that Ms. Fausak did not

² R 460.3409(1) of the Technical Standards for Electric Service, provides that “The customer shall use reasonable diligence to protect utility-owned equipment on the customer’s premises and to prevent tampering or interference with the equipment. The utility may shut off service in accordance with applicable rules of the commission if the metering or wiring on the customer’s premises has been tampered with or altered in any manner that allows unmetered or improperly metered energy to be used or to cause an unsafe condition.”

use ‘reasonable diligence to . . . prevent tampering or interference with the equipment.’”

Ms. Fausak’s exceptions, p. 5. The burden of proof that she used reasonable diligence rests with Ms. Fausak. *See*, Mich Admin Code, R 792.10446, above.

Testimony regarding the meter readers’ failure to report anything suspicious speaks only to the appearance of the meter installed at Ms. Fausak’s home on the dates the meter was read. It does not speak to any action or failure to take action by Ms. Fausak as required by Mich Admin Code, R 460.3409(1). Nor does the performance of duties by the meter readers replace the Complainant’s reasonable diligence responsibilities. Accordingly, this exception cannot be sustained because the ALJ accurately found that Ms. Fausak did not provide evidence of her reasonable diligence to prevent meter tampering.

Ms. Fausak takes exception to the ALJ’s finding that Consumers is allowed to bill her for under-charges and other expenses dating back to October 2010. She believes that Consumers must prove that she was personally involved with or improperly allowed a stolen meter to become attached to her home. Further, she believes that the evidence presented regarding the residency of family and friends in her home was not properly taken into account, and cites the ALJ’s statement that ““those facts alone, if true, do not provide a reasonable explanation for the very significant, readily apparent 5 year decline in the Complainant’s electric bills.”” Ms. Fausak’s exceptions, pp 7-8, quoting the PFD, p. 21.

Consumers replies that Ms. Fausak’s argument “ignores that the evidence in this case indicates that the unauthorized use of electric service occurred at Ms. Fausak’s residence and Consumers Energy reasonably determined the amount of the unauthorized use.” Consumers’ reply to exceptions, p. 3.

The Commission is not persuaded that the ALJ is in error on this issue. The evidence of record, while circumstantial, is compelling. A meter, reported stolen more than five years before from a nearby, vacant house, was found installed on Ms. Fausak's residence. The report of the stolen meter coincided with a dramatic drop in Ms. Fausak's electric use. The discovery of the meter and its replacement with a properly assigned and installed meter coincided with a dramatic rise in Ms. Fausak's electric use. Ms. Fausak testified that she alone was responsible for the bill during the time theft is alleged. As such, she alone benefited from the lower bill. The approximate date of the following month's meter reading was stated on her monthly bills. Therefore, there was known opportunity to switch the meter at the appropriate time each month.

The Commission agrees with the ALJ that the testimony regarding people moving in and out of Ms. Fausak's home does not fully explain the approximate 70% drop and rise in her consumption. Neither the Complainant nor her witness and husband, Mr. Charles E. Fausak, III, stated with certainty when other people were in residence. And, for the period beginning when Mr. Fausak moved out and then intermittently visited Ms. Fausak, his occasional visits render him an unreliable source to speak to who resided with Ms. Fausak during the time frame at issue. According to his testimony, he moved out in either 2008, 2009, or 2012. 2 Tr 33-34, 37.

As stated above, other evidence, such as the stolen meter being found installed on Ms. Fausak's home, her drop in electricity use that coincided with the reported theft of the meter, and her rise in electricity use that coincided with its subsequent removal from her home, make it more likely than not that there was fraud involved. Again, Ms. Fausak alone benefited from the lower bill. Accordingly, it is more likely than not that Ms. Fausak is the person who committed the fraud, whether she personally removed and installed the meters each month, or another person did so at her directive or acquiescence.

The Commission agrees with Consumers' argument that "it is highly improbable that Ms. Fausak's sister stole a meter from a property near Ms. Fausak's residence in 2010, kept the meter for over five years, and then decided to connect the meter to Ms. Fausak's home"

Consumers' reply to exceptions, p. 4. The evidence is not sufficient to establish that it is more likely than not that Ms. Fausak's sister either placed the meter on the house or that she directed another party to place the meter on the house shortly before the fraud was reported to Consumers. Ms. Fausak's exceptions, pp. 2-4. Taking Mr. and Ms. Fausak's description of her sister at face value, it is plausible that she may have gotten angry and possibly had motive to report the fraud as Ms. Fausak theorized. Ms. Fausak's exceptions, p. 11. However, the record does not address why the Complainant believed she was justifiably disconnected on the day the men in coveralls came to her home, but later believed they were imposters, other than the fact that the fraud was reported shortly thereafter. It appears equally plausible that the men in coveralls may have viewed the condition of the stolen meter and themselves reported the fraud. Thus, the Commission is not persuaded that Ms. Fausak's sister placed the stolen meter on Ms. Fausak's residence or that the men in coveralls planted the stolen meter at her sister's direction.

The Commission observes that Consumers provided testimony regarding the calculation of the bill for unauthorized service and related charges. The calculation and assignment of responsibility for the bill to Ms. Fausak is consistent with Commission rules, as testified to by the Staff's witness, Ms. Christina Forist, Manager of the Compliance and Investigation Section at the Michigan Agency for Energy. 2 Tr 55-62, 77-81.

For all the reasons set forth above, the Complainant's exception on this issue cannot be sustained. The ALJ properly considered the entirety of the evidence and testimony regarding Ms.

Fausak's responsibility for incurring the unauthorized electric charges, but was not persuaded by Ms. Fausak's explanations.

Finally, Ms. Fausak alleges that the ALJ was in error when he found that her reliance on the *Jawad*³ case was misguided. Ms. Fausak states *Jawad* is applicable to this case because in *Jawad*, the ALJ found that "[t]he evidence simply does not establish that the Complainant or anyone else tampered with the meter . . . [and] . . . [t]here is really no persuasive evidence as to how or when the meter damage occurred.'" The ALJ in *Jawad* also found that "consumption patterns . . . are not in and of themselves evidence of tampering.'" Ms. Fausak's exceptions, p. 9, quoting the June 11, 1993 Commission order in Case No. U-10126, Exhibit A, p. 6.

Consumers replies that it did not rely on consumption alone to determine that fraud had occurred. Consumers again points out that a stolen meter from a nearby property was found attached to the Complainant's home. Further differentiating this case from *Jawad*, Consumers states that the consumption data in *Jawad* was more consistent with the customer's explanation of decreased use; whereas, in Ms. Fausak's case, the fall and rise of her consumption coincides precisely with the report of the stolen meter and its discovery on her residence. Consumers argues that Mr. and Ms. Fausak's testimony regarding the timelines of individuals moving in and out of the home do not coincide with the reduced use. Consumers' reply to exceptions, pp. 11-12.

The Commission points out that its orders have no precedential imperative. As such, the Commission may look to past orders to inform current orders, but each order is based on the individual facts of the case as presented in the official record.

³ See, the June 11, 1993 order in Case No. U-10126, in which the Commission adopted the findings and conclusion of the ALJ. The order consists of a recitation of relevant facts, but does not contain an analysis of the evidence or PFD. The PFD is attached to the order as Exhibit A.

That said, the Commission agrees with the ALJ and Consumers that the order in *Jawad* is not analogous to the instant case. Evidence that someone caused the damage to the meter in the *Jawad* case was successfully refuted by alternate explanations. *See*, Case No. U-10126, Exhibit A, p. 9. In Ms. Fausak's case, there is irrefutable evidence that a stolen meter was found on her residence. In *Jawad*, a change in business practices satisfactorily explained his reduced use of electricity. *Id.*, pp. 11-15. The fall and rise of Ms. Fausak's registered electric consumption coincides with the report of the theft and the removal of the stolen meter from her home. Thus, the ALJ did not rely on consumption patterns alone and correctly found that the Complainant's reliance on *Jawad* is "misguided." PFD, p. 28. Accordingly, this exception cannot be upheld.

In conclusion, Ms. Fausak reiterates that Consumers, in its zeal to punish fraud, disregarded the "reasonable diligence" language in R 460.3409(1). She argues that she is the victim of fraud, not the perpetrator. Ms. Fausak asserts that she knows her sister reported her to Consumers and that it is more likely than not that her sister had some involvement in the stolen meter being installed on her home. Ms. Fausak asserts the fact that 14 meter readers reported nothing suspicious is sufficient proof that no fraud occurred over the five-year period at issue. Ms. Fausak's exceptions, pp. 10-11.

Consumers concludes that it agrees with the ALJ that "there is a preponderance of the evidence that Consumers properly and reasonably calculated Complainant's bill in a manner consistent with the Commission's rules and Consumers Electric Rate Book." Consumers' exceptions, p. 12, quoting the PFD, p. 27.

The Commission is persuaded that fraud occurred at Ms. Fausak's home beginning in October 2010 and ending on March 21, 2016, through the monthly placement and removal of a stolen meter, which caused a large portion of her electricity use to be unmetered, unauthorized, and

unbilled. A preponderance of the evidence establishes that either Ms. Fausak placed and removed the meter herself, or that another person did so at her directive or acquiescence. Ms. Fausak alone was responsible for the bill during the time frame in question. Ms. Fausak alone benefited from the lower bill. The Commission is not persuaded by Ms. Fausak's alternative explanations regarding the time of placement of the meter and the reasons for her lower use of electricity.

Weighing the totality of the evidence in this case, and for all the reasons discussed above, the Commission finds that Ms. Fausak has not met her burden of proof that Consumers violated the Commission's rules or Consumers' Rate Book C5.2 tariff. The Commission also finds that Consumers has met its burden of proof that fraud occurred, that the amount of the fraud and other allowable charges were correctly calculated, and that Ms. Fausak is responsible for the fraud and for the monetary charges related to the fraud.

Therefore, the Commission adopts the analysis, findings, and recommendations set forth by the ALJ in the PFD. The Complainant's request that the Commission order Consumers to restore her electric service, and bill her for only one year of use as a billing error, rather than for nearly five and one-half years of unauthorized use, is denied.

THEREFORE, IT IS ORDERED that:

A. Brenda Fausak's requested relief, that the Commission order Consumers Energy Company to restore her electric service and bill her for one year of use as a billing error, is denied.

B. Consumers Energy Company may bill Brenda Fausak \$15,327.10 for under charges related to unauthorized use of electric service at her residence from October 2010 to March 2016, including a \$130 connect fee, a \$1,000 security deposit, and \$418.14 in investigative costs.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of November 21, 2017.

Kavita Kale, Executive Secretary